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In the Supreme Court of the United States.

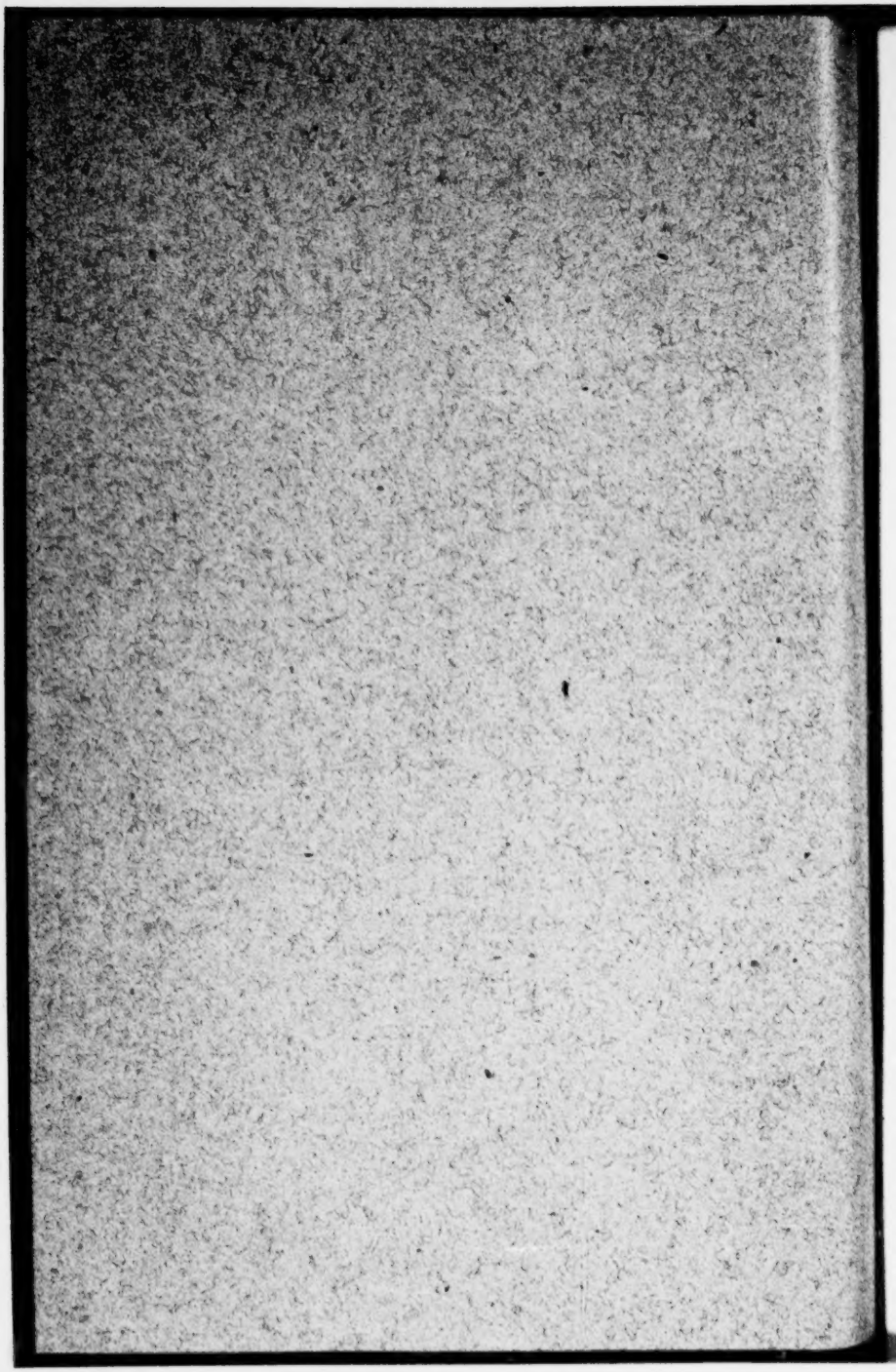
OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE DENVER AND RIO GRANDE RAILROAD Company, defendant in error.

No. 20

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR PLAINTIFF IN ERROR.



In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE DENVER AND RIO GRANDE RAILROAD Company, defendant in error. } No. 231.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action of trover brought in the first judicial district of New Mexico for the conversion of 30,000 logs of the value of $1 each, and 5,500,000 feet, board measure, of lumber and dimension timbers of the value of $12 per thousand, making a total alleged value of $96,000. The declaration was filed in April, 1896; bill of particulars of plaintiff's demand was filed in May; and defendant's plea of general issue, or "not guilty," and plaintiff's replication in May thereafter. The case was brought to trial in the district court in the month of September, 1900. It was tried upon agreed statements of facts, both as to

plaintiff's cause of action and the defense, which written statements were respectively read to a jury by counsel for the parties, subject to the usual objections as to relevancy, competency, and materiality. Plaintiff's facts, together with the objections thereto, may be found in record, pages 8 and 9; the defendant's, pages 9 to 16, inclusive. The court thereupon ordered the jury to find for the defendant, this direction being given in the form of one of the prayers for instructions offered by defendant's counsel. To this action of the court, as well as the refusal of the court to give instructions prayed by him, counsel for plaintiff duly excepted. The instructions given and the exceptions of plantiff's counsel will be found in the record, pages 16 and 17. A motion for new trial of the case, for many reasons therein set forth, was made on the same day (April 4, 1900) that the case was tried. (Rec., pp. 20–21.) This motion was overruled. (Rec., pp. 6–7.) A bill of exceptions was settled November 10, 1900; attorneys on both sides were present and signed the bill. The trial judge also signed the bill and the clerk appended a complete certificate. (Rec., pp. 7–22, inclusive.) On January 9, 1901, an assignment of errors was filed by plaintiff's attorney. (Rec., pp. 22–24.) On January 22 and 23 following the case was set down and argued in the supreme court of the Territory. (Rec., pp. 24–25.) On October 2 following the case was decided (Rec., p 25), the opinion being set forth in the record, pages 27–30, inclusive. The case was then brought here on writ of error.

QUESTIONS INVOLVED.

INSTRUCTIONS TO JURY.

The first question raised is whether, under the law and the agreed statement of facts, the trial court was right in refusing to direct a verdict for plaintiff for the agreed value of the product converted, and was right in directing a verdict for the defendant. This question grows out of the claim that the cutting was admitted in plaintiff's statement of facts; also the value of the product converted; that the land from which the product was taken was property of the United States; and that the entire defense made was under certain special acts of Congress which were not pleaded, and by virtue of which defendant could not contest under the plea of not guilty. This as to the first part of the question. As to the second part of the same, relative to the direction of the court that a verdict should be found for defendant, it grows out of the situation last above stated, and also from the contention of defendant and ruling of the court that it was the duty of the plaintiff not merely to show the conversion by defendants, but show affirmatively that the product converted was not used by defendant for construction and repair of its road, and no evidence having been offered for such purpose, that plaintiff had not made a case.

SUFFICENCY OF DEFENDANT'S PLEA.

The second question raised is whether, in an action of trover, the simple plea of not guilty is sufficient to permit the introduction in evidence of certain special

statutes upon which the defense is made, where the pleadings are framed under the code of New Mexico. This question grows out of the statutory pleadings of New Mexico. The declaration was not of the old common-law form for such a pleading in trover, but in the brief, simple language authorized by the statute. The defendant's plea was "Not guilty," and under it plaintiff's counsel contended that it was not competent to introduce a special statutory defense. Both courts below held the other way.

BURDEN OF PROOF.

The third question involved herein is the right of the court to put upon the plaintiff the burden of showing that the converted product was *not used* for the purposes mentioned in the statute under which defendant sought to justify the alleged conversion. This question arose from the nature of the special defense, which was that the defendant had a right to take the product in question for construction and repair of its road. Plaintiff's counsel contended that if permitted to make this defense, defendant must show that it was taken and used for such purpose, while the court held that plaintiff must show that the product was not only taken but was used for purposes other than such construction and repair.

ASSIGNMENT OF ERRORS.

FIRST.

The supreme court of New Mexico erred in deciding that the district court for the first district of that Terri-

tory was correct in refusing to instruct the jury, as requested by plaintiff's counsel, as follows:

> The jury is instructed to return a verdict in favor of the plaintiff and against the defendant for the sum of $18,000,

which was the agreed value of the product alleged to have been converted. And the court further erred in affirming the correctness of the instruction given to the jury, which was in the following language:

> The court instructs the jury that by the act of Congress of the United States the defendant railroad company had the right to take from the public lands in the declaration described such timber as was required for the repair to that part of its railroad and telegraph lines constructed prior to June 8, 1882; that having such lawful right to cut timber on said lands for the purposes mentioned, the law presumes that whatever cutting was done there by it, or under its authority, was in furtherance of the objects permitted by said statute, and that the railroad company in so doing was acting in accordance to and within the terms of the said act of Congress and not in violation thereof. Under these circumstances the burden in this case is on the plaintiff to establish affirmatively, by a preponderance of the evidence, that the timber in the declaration mentioned was actually taken by the railroad company from the specific lands named in the declaration, and was used for some purpose or at some place not contemplated by the act of Congress. The plaintiff having offered no evidence to show that the defendant

did use such timber for any purpose or at any place not so contemplated by said act of Congress, you are instructed to find a verdict for the defendant.

SECOND.

The supreme court of New Mexico erred in deciding that the district court was right in allowing a special defense under a private statute to be made without pleading such statute in addition to the plea of general issue or "not guilty." The defense admitted the taking and conversion of the property, but claimed that the same was permissible under a certain act of Congress granting such permission. The act was a private one, applying only to the defendant's railroad. The defendant's statement of facts embodied only this act and the alleged doings of the railroad company thereunder, and the whole of such defense was objected to in detail by plaintiff's counsel, because such defense was not properly pleaded, which objections were overruled, and to which rulings exceptions were duly taken. The statute in question is the act of June 8, 1872 (19 Stat. L., 405), and reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and sidetracks, not exceeding twenty acres at any one station, and

not more than one station in every ten miles, and the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line, be, and the same are hereby, granted and confirmed unto the Denver and Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado, its successors and assigns; and all the rights, powers, and franchises conferred by the said laws on corporations created under them for constructing and operating railroad and telegraph lines are hereby ratified and confirmed to the above-named railway company, its successors and assigns; and the same rights, powers, and franchises conferred by the general incorporation laws of the Territory of Colorado for the construction of railroads and telegraph lines are hereby granted to the said company, its successors and assigns, for the extension and operation of its railway and telegraph line in and through any contiguous territory of the United States to the northern boundary line of Mexico, subject to the compliance with the conditions and requirements of the general incorporation of such territory so far as the same are applicable and not inconsistent with the laws of the United States; and the same rights, powers, and privileges conferred upon the Union Pacific Railroad Company by section three of an act approved July second, eighteen hundred and sixty-four, are hereby conferred upon the above-named

company, its successors and assigns: *Provided*, That applications for the assessment of damages shall be made to the court, or any judge of a court having jurisdiction in the county in which the lands or premises lie: *Provided*, That said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe within five years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter, and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road: and, *Provided further*, That nothing in this act contained shall be construed as affirming or denying the right of any Territory to incorporate a railroad company.

Said act was amended on March 3, 1877, and said amendment reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," approved June eighth, eighteen hundred and seventy-two, be, and the same is hereby, amended by making the second proviso in said act read as follows, to wit:

"*Provided*, That said company shall complete its railway as far south as Santa Fe within ten years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter, and in default thereof the rights and privileges herein granted shall be

rendered null and void so far as respects the unfinished portion of said road."

The first objection made covering the point stated may be found in the record on page 9, and reads as follows:

> Second. Because there has been no foundation laid in this case for the introduction of this special act of Congress in the pleadings. We contend that it is the duty of the defendant to plead this act and prove it, and therefore the statement contained in that paragraph is incompetent, irrelevant, and immaterial.
>
> The COURT. The objection will be overruled.

This objection was, in substance, repeated to all the statement of facts constituting the defense. The statute of New Mexico under which the pleadings were framed, or so much thereof as apply to this assignment of error, may be found in the Laws of New Mexico, 1889, and reads as follows:

> The forms of pleadings which follows shall be sufficient in actions at law, and the like forms may be used with such modifications as may be necessary to meet the facts of the case; but whenever there shall be annexed to or filed with any pleading the original or copy of any writing in such pleading the original or copy of any writing in such pleading referred to, such writing shall be deemed a part of such pleading if the pleading in terms declares it to be so.
>
> * * * * *
>
> Forms of pleas in actions for wrongs.
>
> Fifty-third. That he is not guilty of the wrong alleged.

Fifty-fourth. *That he did what is complained of by the defendant's leave.*

Fifty-fifth. That the plaintiff was not entitled to the said way over the defendant's lands as the plaintiff has alleged.

Fifty-sixth. That the plaintiff first assaulted him and he committed the assault in his own defense.

Fifty-seventh. That the defendant, at the time of the alleged trespass, was possessed of land called "Idlewild," in ——— County, and was entitled to a way from said land over the land of the plaintiff to a public highway for himself and his servants, with horses and wagons, to go and return at all times, at his and their free will, for the more convenient occupation of the said land of the defendant, and that the alleged trespass was a use by the defendant of said way.

THIRD.

The supreme court of New Mexico erred in holding that the district court was correct in charging the jury that the burden of proof was upon the plaintiff to show that the property converted was used for some purpose or at some place not contemplated by the act of Congress. This error grows out of the statute under which defendant sought to show permission by grant of Congress. The particular clause of the statute is as follows:

> And the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line. * * *

The charge of the trial court is as follows (Rec., p. 16):

> Under these circumstances the burden in this case is on the plaintiff to establish affirmatively, by a preponderance of the evidence, that the timber in the declaration mentioned was actually taken by the railroad company from the specific lands named in the declaration, and was used for some purpose or at some place not contemplated by the act of Congress. The plaintiff having offered no evidence to show that the defendant did use such timber for any purpose or at any place not so contemplated by said act of Congress, you are instructed to find a verdict for the defendant.

The language of the supreme court in affirming the correctness of this part of the charge of the trial court is as follows (Rec., p. 28):

> The third question presented is in regard to the burden of proof as to the lawful or unlawful use of timber by defendant in error. This question was determined by this court on the former appeal, and we held the burden to be upon the United States.

ARGUMENT.

FIRST.

The court erred in refusing to instruct the jury for a verdict for plaintiff for the amount agreed upon as the value of the property converted.

It is submitted that this request was well founded. The case presented to the court and jury rested upon the agreed statement of facts. The land, at the time

of the cutting, belonged to the United States, and that it was so conceded is established by the plaintiff's statement in the following language (Rec., p. 8):

> *Third.* That at the time of said cutting said lands were the public lands of the United States situated in Rio Arriba County, N. Mex.

The amount of timber cut by the New Mexico Lumber Company was 2,100,000 feet, which was furnished to defendant. This was established by the statement of the plaintiff in the following language (Rec., p. 8):

> *Second.* Prior to the beginning of this suit the said New Mexico Lumber Company did cut from the lands described in the declaration 2,100,000 feet of lumber, and the same to that amount was furnished to and received by the defendant railroad company for its use.

The lumber was delivered to said defendant, as appears also from the plaintiff's statement in the following language (Rec., p. 8):

> *Fifth.* The said New Mexico Lumber Company delivered the said 2,100,000 feet of lumber to the defendant railroad company during the period of time extending from January 1, 1894, to August 1, 1895.

The value of the lumber was $9 per thousand feet, as appears from the statement of the plaintiff in the following language (Rec., p. 8):

> *Fourth.* That the stumpage value of the said timber which was cut and delivered to the defendant railroad company was then $2 per

> thousand feet, and the value of said lumber in the manufactured state, as delivered, was $9 per thousand feet.

It should be remembered that these facts were all signed and agreed to by the attorneys for both the plaintiff and the defendant, as appears from the record, page 18. They constitute a prima facie case coming within the rule of the Woodenware case (106 U. S., 432), which reads as follows:

> Where he is a willful trespasser, the full value of the property at the time and place of demand, or of suit brought, with no deduction for his labor and expense.

This rule would apply unless the defendant met such case by some agreed statement which could be properly introduced under the pleadings in the case; in other words, which was competent, relevant, and material. Under the plea of "not guilty" the defendant was precluded from any defense of a special nature. Objection was made to the introduction of all of the defendant's statement of facts in advance of its having been read to the jury. That objection was stated by plaintiff's counsel in the following language (Rec., p. 9):

> *Second.* Because there has been no foundation laid in this case for the introduction of this special act of Congress in the pleadings. We contend that it is the duty of the defendant to plead this act and prove it, and therefore the statement contained in that paragraph is incompetent, irrelevant, and immaterial.

This objection was made to apply to two acts of Congress, which were introduced by the plaintiff, and which have been previously quoted in full in our assignment of errors. No attempt was made in defendant's statement of facts to deny the title of the Government to the lands described in the declaration, the cutting of the timber, the amount of lumber manufactured, its delivery to the defendant company, or the value of it. The whole defense rested upon the claim of license under the acts of Congress not pleaded. Under such circumstances, in our view of the defendant's plea, the request made by plaintiff for an instruction to the jury was strictly accurate and proper. Its refusal by the court was plain error, and the approval of the supreme court of the Territory of such refusal was error. Inasmuch as the subject of this pleading will be more fully discussed further on in this argument, nothing more will now be said upon this branch of the assignment of errors.

The court also erred in instructing the jury upon several points as requested by the defendant.

The first subject of that instruction was equivalent to a ruling that the lands mentioned in the plaintiff's declaration were, *as a matter of law*, such lands as defendant had a right to take timber from for the construction and repair of its railroad and telegraph lines. While it is submitted that such an instruction was doubtful as a legal proposition, and under the state of the pleadings, as above contended, was not in any sense competent, relevant, or material, it will not be

urged, because of the more conspicuous and clearly defined errors comprehended within the remainder of the instruction given.

The next subject of the instruction of the court was that whatever cutting was done under the defendant's authority was presumed to have been done in furtherance of the objects permitted by the act of June 8, 1872, and in accordance with the terms of said act and not in violation of it. This proposition is so remarkable in its character as to challenge the attention of the most casual observer. From what source could such a presumption be drawn? Upon what theory could it be based? Such instruction is directly contrary to the opinion of this court in the case of the *Northern Pacific Railway* v. *Lewis*, which will hereafter be commented upon in considering the question of burden of proof, and contrary to the general principle stated by elementary writers, and almost, if not quite, always adhered to in similar cases. It would seem to be a very rash departure from such rules as well as the common sense of the situation, and it is difficult to understand how a court could be led by the persuasion of counsel to submit such a direction to a jury.

But this part of the charge is immediately followed by a statement of the burden of proof in the case: That it was upon the plaintiff to establish by a preponderance of the evidence that the timber taken was for some purpose or at some place not contemplated by the act of Congress, and inasmuch as the plaintiff had offered no evidence upon these points, the jury was instructed to find for the defendant. There is no equivocation or

implied reservation in this charge. It is stated in as plain and bold terms as the learned counsel for the defendant could well have used for the purpose, and consists of the invasion of settled principles long established upon a sound and practical basis of reasoning. A thorough discussion of this matter will follow under another of the assignments of error, where authorities will be quoted and discussed. But it is contended on the part of the plaintiff in error that the whole of this charge, approved, as it was, by the supreme court of the Territory, in addition to being in line with and pursuant to a defense impossible under the pleadings in the case, was error in general and in detail.

SECOND.

The court erred in holding defendant's plea sufficient to admit of a special statutory defense.

It is nowhere contended that the defendant was not guilty of the appropriation and use of the property. The plea was "not guilty"—that and nothing more. The defense sought to be made was by virtue of a private act containing a grant to defendants as a corporation. The whole nature of the defense required a special plea. At common law it would have been so. Under the common-law practice, as modified by statute in many States, it would have required a special notice under the plea of "not guilty."

Chitty lays down the following doctrine (vol. 1, p. 655):

> In *trover*, as in assumpsit, all matters of confession and avoidance must be pleaded

specially, so that where there has been a conversion in fact and the defendant insists that such conversion was lawful, without denying the plaintiff's possession, he must plead specially the right or title by virtue of which he was justified in the commission. (Chitty on Pl., vol. 1, p. 655.)

And as to pure trespass the same author has this to say:

An excuse of the trespass, as on account of a defect of fences, which the plaintiff was bound to repair, or a license from the plaintiff, * * * or in respect of any easement, or incorporeal right, as common of fishery, or of pasture, or of turbary, and as right of way, either public or private, and whether by grant, will, prescription, custom, or of necessity, must always have been and of course still must be specially pleaded.

A justification of the trespass in respect of any claim by custom, prescription, or grant, to any right of common or other profit from or upon land, or to any way or other easement, or to any water course, or to the use of any water, must be pleaded. * * * License from the plaintiff must be specially pleaded (p. 655).

Stephen, in his work on Pleading, paragraph 347, uses the following language:

It is not necessary to set forth a public statute. The case, however, of private acts of Parliament is different, for these the court does not officially notice; and therefore where a party has occasion to rely on an act of this description he must set forth such parts of it as are material. (Stephen on Pl., par. 347.)

From the Encyclopedia of Pleading and Practice, volume 1, 845, we quote the following:

> Matters in justification of an act which would otherwise be unlawful must be specially pleaded.

The conversion of timber unlawfully cut, or lumber from timber unlawfully cut, as in this case, could only be justified under a special plea.

Again, from the same work, volume 1, page 848, we quote:

> The defense of leave and license must be specially pleaded.

Leave and license was the defense in this case.

In the famous case of *Young* v. *Cooper* (6 Exch. Rep., 259), the court makes use of the following language:

> At common law, in all actions on the case the plea of not guilty operated only as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant and no other defense than such denial was admissible under the plea. Matters of confession and avoidance in *trover* must be specialty pleaded.

Federal decisions clearly in line with our contention are not wanting. In the case of *Mack et al.* v. *Lancashire Ins. Co.* (1 Fed. Rep., 193), the court, in construing the statute of Missouri relating to the answer of the defendant amendatory of the common-law forms of pleading, which reads in part as follows:

> The answer of the defendant shall contain, first, a general or specific denial of each material allegation of the petition controverted by the defendant, or any knowledge or information

> thereof sufficient to form a belief; second, a statement of any *new matter* constituting a defense or counterclaim, in ordinary and concise language, without repetition,

said:

> The State statute of 1875 permits, instead of a specific denial as to each of the allegations, a general denial; but it does not, and I wish this distinction understood as the rule of the court, it does not permit, under a general denial, affirmative matters of defense to be set up. * * * The statute, as I interpret it, is this: You may put in a general denial as to each allegation on which the plaintiff's right of recovery depends, instead of putting, as heretofore, a specific denial of each *seriatim;* but when you come to affirmative matters you must then specify each matter of defense according to the rules of pleading pertaining thereto.

The object of that statute, as of the statute of New Mexico, is to simplify and abbreviate pleadings. In the Missouri statute this idea is conveyed by the general language of it, whereas in the New Mexico statute the forms are given by way of illustration. But both statutes have the same objects in view and are identical in substance and effect.

In *Walker* v. *Flint* (11 Fed. Rep., p. 31, Mo.) the court, at page 33, say:

> The uniform ruling of this court has been that a general denial under the code is not equivalent to a general issue at the common law, whereby certain affirmative or quasi-affirmative

> matters can be heard. * * * If the defendant has an affirmative defense in the nature of an avoidance, he must plead it.

State courts have, in a large number of instances, dealt with the same question in the same general manner and to the same effect.

> In an action to recover damages for the pollution of a stream, the defense of justification *by virtue of a statute* must be specially pleaded. (*Kellogg* v. *New Britain*, 62 Conn., 233.)
>
> All matters justifying a trespass on land must be specially pleaded.
>
> *Lentz* v. *Victor*, 17 Cal., 272;
> *Pico* v. *Colimas*, 32 Cal., 578;
> *Alferd* v. *Barnum*, 45 Cal., 482;
> *Carter* v. *Wallace*, 2 Tex., 206;
> *Klais* v. *Pulford*, 36 Wis., 587.
>
> A license to enter upon land for any purpose must be specially pleaded.
>
> *Snowden* v. *Wilas*, 19 Ind., 11;
> *Chase* v. *Long*, 44 Ind., 427.
>
> Under the code of New York, in an action to recover damages for injuries received by plaintiff in consequence of falling through a coal hole in the sidewalk, the defense of license to construct the hole must be specially pleaded, and it must be alleged that the terms of the license were complied with. (*Clifford* v. *Dam*, 81 N. Y., 53.)

In assigning error upon this point in this brief we have quoted this statute of New Mexico relative to pleadings and governing in this case. Let us now carefully examine the same:

The fifty-third paragraph gives a short form of a denial of the wrong alleged, namely, "Not guilty." That was the plea adopted by the defendant herein.

The fifty-fourth paragraph is intended as a short form of plea in confession and avoidance.

The fifty-seventh paragraph suggests a somewhat more lengthy explanation of the nature of the defense.

Returning to section 1, it will be seen that after all it was intended by the statute that these forms should be used with such modifications as may be necessary to meet the facts of the case. We contend that this language expressly limits the scope of the act, and that it was not intended or expected by the legislature to excuse a party in pleading from so modifying the forms suggested as to apprise the plaintiff in some manner when a special statutory defense should be made. Take No. 54, for instance: We say that in view of the general rules of pleading applicable to such defense as the appellees here made in the trial court that in order to fulfill the intendment and spirit of the act the plea should have been something like this:

> That he did what is complained of by plaintiff's leave, as granted defendant by the act of Congress of June 8, 1872, as amended by the act of March 3, 1877.

(It will be observed that a mistake is made in the statute in the use of the word "defendant's," which should, of course, read "plaintiff's.")

In other words, we claim that it was not at all expected that the legislature in passing this act intended

to do otherwise than merely simplify and abbreviate pleading, and that it was especially not expected or provided that the suggestions or forms of pleas set out should serve to admit in evidence a defense totally different from that indicated in the plea made use of.

THIRD.

The court erred in holding the burden of proof was upon the plaintiff to show that the timber was used for purposes not contemplated by the act.

The use to which the timber involved in this case was put is matter peculiarly within the knowledge of the defendant company, which is defendant in error here. To compel the Government to prove that the timber was not used for purposes contemplated by the act would, in effect, be to enforce proof of a negative. Out of its own mouth the supreme court of Mexico stands condemned of error. In *United States* v. *Gumm et al.*, decided in August, 1889, by that court, reported in 58 Pac. Rep., 401, the action was trover, as here. The defense was license under the act of June 3, 1878. In this case license of the same general character is involved. The judges of the court were the same judges who unanimously decided this case, and the court was unanimous in the Gumm case. We quote from the opinion:

> The burden of proof was upon the plaintiff to establish, by a preponderance of the evidence, the cutting and conversion of the timber by the defendants, or some of them, from the public lands, but the burden of proof was undoubtedly

> upon the defense to show the right to so cut and dispose of such timber. This right is designated as a license in this case and the defense recognized the necessity of showing the right by pleading license. Having pleaded license to cut and dispose of such timber the burden of proof was upon the party pleading license as a defense to maintain the plea and thus excuse the act. It should be so for the further reason that some of the facts constituting this defense are within the knowledge of the defense only, and therefore the plea can not be maintained without their disclosure by the defendants.

One of two conclusions must necessarily be arrived at after a reading of that case, viz, that the court, in this case, intended to reverse its ruling in the Gumm case, without apology or explanation and in no uncertain way, or else they hold a private individual to one rule of conduct and applied a directly opposite rule to a quasi-public corporation.

In this work on Evidence, Mr. Starkie, at paragraph 509, says:

> It is a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact, of which he is supposed to be cognizant.

In *Commissioners* v. *Towle*, (138 Mass., 490), where one being indicted for illegally selling liquors on the Lord's Day, justified under a license to sell liquor to guests of his hotel, it was held that there being no evidence adduced by the defendant that the purchasers were guests, he was properly convicted.

Stone v. *United States*, 64 Fed. Rep., 667 (C. C. A.), was an action brought by the United States to recover value of timber cut upon public lands. Defendant claimed he purchased the timber from settlers on such lands under preemption and homestead laws, and the court held the burden to be on him to show the good faith of such settlers and their right to cut and sell such timber under the statutes.

Selma, Rome and Dalton Ry. Co. v. *United States* (1891), 139 U. S., 560, was an action brought in the Court of Claims for carriage of mails prior to the rebellion. The claim was based upon the act of March 3, 1877. That act appropriated money for payment of mail services performed prior to the rebellion, provided that such claims as have been paid by the Confederate government under its act of August 30, 1861, shall not be again paid. The question was whether the claimant should prove he had not been paid by the Confederate government, or the United States that he had. The court held, even though it was negative matter, that the claimant must bring himself within the terms of the act, or he made no case. Said the court, speaking through Mr. Justice Harlan:

> The act of 1877 was, in effect, an invitation to all having claims of the class described in it, which had not been paid by the Confederate States, to present them for payment out of the sum appropriated by it for that purpose, leaving those seeking the benefit of the act to show that their claims were of that class. Besides, as the fact of payment or nonpayment by the

Confederate government was peculiarly within the knowledge of the claimant, or within his power—if the power is in anyone—to establish, it may well be supposed that Congress intended that a claimant, as a condition of payment by the United States, should show that his demand belonged to the class for which the act of 1877 provided. But there was no proof on the subject by the plaintiff, nor does it appear, if that fact were material, that such proof was impossible. It prepared the case and went to a hearing upon the theory that it was entitled to judgment, upon proof *simply of the services rendered*, unless the United States showed that the claim in suit had been in fact paid by the Confederate government. We can not accept that interpretation. * * *

"From the very nature of the question in dispute," says Mr. Best, "all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or easily attainable by, one of the contending parties, who accordingly could at once put an end to the litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant."

In *United States* v. *Cook* (19 Wall., 591) this court held that where timber was cut upon public lands occupied by Indians, the purchaser of such timber, when sued for the value of it, must show the right of the Indians to take the timber in order to maintain his title.

And the doctrine of the Cook case was reaffirmed by this court in the case of the *Northern Pacific Railway Company* v. *Lewis*, 162 U. S., 366 (1895). This was an action by Lewis against the railroad company for cord wood which had been destroyed by sparks from an engine of the defendant company. The title of Lewis to the timber was assailed, and he claimed the right to the timber under the act of June 3, 1878, he having cut some himself and bought some from others who claimed the right under the same act. We rely almost entirely upon the holding of this court in this case as to the question of burden of proof.

The decision of the lower courts in the case at bar was in direct contravention of the holding of this court in the Lewis case. The cases are almost entirely similar in principle, and while the entire opinion in the Lewis case is filled with language serving to show how erroneous the decisions of the lower courts were in the case at bar, we venture to make only two quotations therefrom, inviting the attention of the court, however, to the case generally:

> The right to cut is exceptional and quite narrow and for specified purposes only. The broad general rule is against the right. If the plaintiffs had acquired the right by reason of a com-

pliance with the provisions of the statute, the facts should have been shown by them. The presumption in the absence of evidence is that the cutting is illegal (p. 376).

As the Government was the sole and absolute owner of these lands and of the timber growing thereon, the presumption would be against the right of any third person to cut the timber, and if he claimed the right by virtue of any authority or license given him by the owner, that is, the Government, he would be compelled to show it. *There was no evidence given on this subject by either party, and hence the plaintiffs did not satisfy the burden of proof which rested upon them in this behalf* (p. 377).

(Italics are ours.)

For the reasons above stated it is believed that the judgment of the supreme court of New Mexico should be reversed.

Respectfully submitted.

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